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In The
Supreme Court of the United States

DAVID GOETZ, COMMISSIONER,
TENNESSEE DEPARTMENT OF FINANCE
AND ADMINISTRATION, ET AL.

Petitioners,

v.

JOHN B., BY HIS NEXT FRIEND, L.A., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should exercise its extraordinary power in certiorari to review the Sixth Circuit's interlocutory decree denying Petitioners' Petition for Writ of Mandamus where the Sixth Circuit's decision does not conflict with any other circuits and is plainly correct.

2. Whether this Court should exercise its extraordinary power in a case which turns on specific factual findings of the lower courts and where Petitioners' arguments rest on unsupported innuendo.

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THE RESPONDENTS' BRIEF IN OPPOSITION

SUPPLEMENTAL STATEMENT

This nine-year-long litigation involves Petitioners' compliance with federal law in administering its Medicaid program, "TennCare." In October 2004, District Judge John Nixon entered an order finding that the State did not comply with a 1998 consent decree and presented a remedial plan prepared by the special master ("October 2004 Order"). Petitioners challenged the October 2004 Order as "tainted fruits" of allegedly improper *ex parte* communication between the judge and the special master. In order to eliminate the distraction of this baseless charge from a case involving urgent need for medical care of Tennessee children and to avoid a protracted discovery battle waged by Petitioners, Judge Nixon vacated the October 2004 Order and *sua sponte* recused himself in February 2006. The case was immediately reassigned to a new judge.

To keep the case on track, the new judge relieved the special master of his duties and appointed a new panel of monitors to act as a special master. To preserve the knowledge and expertise accumulated by the former special master in this complicated litigation, the new judge retained the former special master as a technical advisor for the new monitors and decided to consider the proposed remedial plan prepared by the former special master as one of the potential remedial plans. The new judge ordered full discovery related to the proposed remedial plan and the underlying report and a full hearing on Petitioners' compliance with the Consent Decree.

Petitioners sought disqualification of the former special master as a technical advisor, discovery concerning the allegedly improper *ex parte* communication, and

suppression of the proposed remedial plan and the underlying report. The new judge denied Petitioners' requests. Petitioners then petitioned for a writ of mandamus from the Sixth Circuit. Upon denial of the petition by the Sixth Circuit, Petitioners now seek to invoke this Court's extraordinary certiorari power to review the Sixth Circuit's refusal to issue the writ of mandamus.

A. Procedural History and Prior Judicial Findings of Tennessee's Failure to Comply with the Consent Decree.

In accepting federal Medicaid funding over many years, Tennessee promised to comply with federal laws. Those laws include an obligation to meet early and periodic screening, diagnosis and treatment ("EPSDT") standards for children enrolled in its Medicaid program, called "TennCare." In 1998, TennCare entered into a consent decree with Respondents that incorporated those federal standards and gave the State an extended period to fully implement them ("Consent Decree"). (Pet. App. 25a.)

In 2001, following a three week hearing, Judge Nixon found that the State had "failed to ensure compliance with all aspects of the EPSDT mandate . . . " (*Id.* at 18a, 25a.) Despite the finding, the court did not find contempt or impose sanctions against the State. The court appointed a special master to mediate the development of a remedial plan in April 2002. The April 2002 appointment order authorized *ex parte* communications between the special master and the parties and/or their counsel. (*Id.* at 77a-79a.) The order did not address the issue of *ex parte* communication between the special master and the Court. (*Id.* at 78a.)

In August 2002, the district court concluded that the special master's mediation efforts had failed to produce a consensus plan for achieving compliance. (*Id.* at 18a.) He revised the special master's role to facilitate and assess the State's compliance. (*Id.*) He authorized the special master to hire experts to assist in that task. (*Id.* at 72a.) The district court informed the parties that it would periodically measure the State's adherence to the terms of EPSDT law and the Consent Decree, and that, in so doing, it would be "guided by the Special Master's input." (*Id.* at 18a.)

The court received such input in ongoing *ex parte* communications between the special master and the district court. The communications were a matter of public record; the State was aware of them. (*Id.* at 99a.) The State did not object to the special master's communications with the court prior to the October 2004 Order.

B. Judge Nixon's October 2004 Order and His *Sua Sponte* Recusal.

On October 22, 2004, Judge Nixon found the State in violation of the Consent Decree. (*Id.* at 29a.) Judge Nixon attached a proposed remedial plan prepared by the special master. (*Id.* at 31a.) He requested that the parties review the plan and file any objections with the court. He allowed the parties to depose the special master and his experts. (*Id.* at 32a.) The court indicated that he would make a final determination regarding the remedial plan once he reviewed the comments and suggestions filed by the parties at the close of the post deposition comment period. (*Id.*)

The process envisioned by Judge Nixon never occurred. The State immediately attacked the October 2004

Order and the proposed remedial plan, based on allegedly improper *ex parte* communications between the court and the special master. (*Id.* at 19a.) The State sought discovery concerning such *ex parte* communications. However, due to a state fiscal crisis, the court held the case in abeyance to facilitate negotiations and while it determined issues raised in a companion TennCare case. (*Id.* at 19a, 22a.)

When the court reactivated the case in November 2005, the State renewed its objections to the October 2004 Order and the proposed remedial plan. Both the Petitioners and the Respondents proposed that the court vacate the October 2004 order. (*Id.* at 19a.) As a result, Judge Nixon vacated the October 2004 order. (*Id.*)

Because of the State's insistence on further discovery into the allegedly improper *ex parte* communication, Judge Nixon *sua sponte* recused himself in February 2006 to avoid a protracted dispute over collateral issues, stating that "the healthcare of Tennessee's children must come first." (*Id.* at 20a-21a.)

C. The Replacement of the Special Master With Five New Monitors.

Judge William J. Haynes, Jr. took over the case in February 2006. He undertook several steps to keep the case on track, to "avoid collateral issues from interfering with the resolution of the Defendants' compliance" and "to meet the urgent medical care needs of the children." (*Id.* at 9a.)

First, Judge Haynes relieved the special master of his duties as a special master and reappointed him "as a technical advisor for this non-traditional litigation under

the inherent authority of this Court." (*Id.* at 12a.) Judge Haynes subsequently explained that the retention of the technical advisor was necessary because he "did not want to lose the resources that have been expended or the acquired knowledge that they have accumulated in their work." (*Id.* at 100a.) Judge Haynes specifically instructed the technical advisor not "to report to or communicate with the Court." (*Id.* at 4a.)

Judge Haynes appointed a new panel of monitors to replace the former special master. (*Id.* at 6a.) Judge Haynes ordered the new monitors to "serve in a quasi-judicial capacity" and to "have the principal responsibilities of monitoring the Defendants' compliance with the Consent Decree in designated areas." (*Id.* at 6a-8a.) The former special master and his experts would remain available to the parties as expert witnesses, and the monitors could use them as technical advisers. (*Id.* at 131a.)

D. Judge Haynes' Order For An Evidentiary Hearing and Full Discovery To Prepare for the Hearing.

Judge Haynes also ordered an evidentiary hearing on June 19, 2006. (*Id.* at 14a.) He ordered the parties "to commence discovery immediately on the status of the Defendants' compliance of the Consent Decree and the Courts' Orders as well as the status of any plan or process of the Defendants to do so." (*Id.* at 12a.) Judge Haynes indicated that he would include the proposed remedial plan prepared by the former special master among the plans to be considered. (*Id.* at 134a.)

Judge Haynes directed the former special master to disclose to the parties all non-privileged documents on which his report had been based. (*Id.* at 13a.) He granted the parties leave to take discovery of the former special master and his experts regarding the bases of their findings or recommendations in the report and the proposed remedial plan. (*Id.* at 95a-96a, 106a, 108a-109a, 124a, 128a, 134a-135a.) He imposed only two limitations on the discovery: no inquiry concerning any communication between the former special master and Judge Nixon or any communication between any employee or agent of either party and the former special master (as agreed upon by the parties). (*Id.* at 13a-14a, 96a, 106a, 117a, 129a, 134a.)

E. The State's Petition for Writ of Mandamus to the Sixth Circuit.

Subsequent to Judge Haynes's orders in early 2006, the State renewed its demand to take discovery of the *ex parte* communications between the former special master and Judge Nixon. The State also sought disqualification of the former special master as a technical advisor as well as suppression of the October 2004 Order and the proposed remedial plan. Upon Judge Haynes' rejection of those requests, the State petitioned for a writ of mandamus in the Sixth Circuit.

The Sixth Circuit panel unanimously denied the petition on its face in an unpublished decision. (*Id.* at 2a-3a.) Upon the state's petition for rehearing en banc, not a single member of the court voted to disturb the panel's ruling. (*Id.* at 81a.) The Court of Appeals found that the "petitioners have not demonstrated a clear and indisputable

right to the disqualification of the technical advisors because they have not shown that they were or are acting in a quasi-judicial capacity." (*Id.* at 3a.) The Sixth Circuit also found that "the recusal of the district judge with whom the alleged *ex parte* communications occurred convinces us that rulings in this case will not be based on information that may have been communicated to the prior judge that has not been placed on the record and which the parties have not had the opportunity to challenge." (*Id.*) The Sixth Circuit further concluded that since the previously undisclosed report was now part of the record, the parties could litigate the issues raised in the report. (*Id.*)

REASONS FOR DENYING THE WRIT

A petition for a writ of certiorari to review an interlocutory order should be granted only upon a showing that the case is of such "imperative public importance as to justify deviation from normal appellate procedure and to require immediate determination in the Supreme Court." U.S. Sup. Ct. Rule 11. The Court has repeatedly cautioned that such a petition is not granted unless it is necessary to prevent extraordinary inconvenience and embarrassment. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1950); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (writ of certiorari should not be granted except "in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal"); *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893) (commenting that a writ should not issue "unless it is necessary to prevent extraordinary inconvenience and

embarrassment in the conduct of the cause"). This Court's certiorari power is "sparingly exercised." *Forsyth v. Hammond*, 166 U.S. 506, 515 (1897). "Such a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. Rule 10.

No extraordinary circumstances exist in this case which justify granting the petition. The Sixth Circuit's decision does not conflict with rulings of other circuits. Petitioners have engineered the alleged conflict by mischaracterizing the Sixth Circuit's ruling and by engaging in wholly unsupported assumptions.

The Sixth Circuit's decision is also plainly correct. Invoking this Court's supervisory power at this stage is improper because Petitioners are merely inviting the Court to second guess the lower courts' factual findings and to intervene prematurely with the lower courts' exercise of their discretionary duties.

I. The Sixth Circuit's Denial of the Extraordinary Remedy of Writ of Mandamus Does Not Conflict with Other Circuits.

Petitioners' sole rationale for invoking this Court's extraordinary jurisdiction is the alleged existence of a "square conflict" between the Sixth Circuit's unpublished interlocutory order and the D.C. Circuit's decision in *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006). There is no such conflict. Petitioners' conflict argument rests on a mischaracterization of the Sixth Circuit's decision below and unwarranted assumptions. (Pet. at p. 10.)

Petitioners characterize the Sixth Circuit's decision as adopting a rule "that a judicially appointed officer performing [quasi judicial] functions need not be impartial." (*Id.* at p. 12.) Petitioners assert that an inter-Circuit conflict exists because the D.C. Circuit and all other jurisdictions held that special masters are subject to disqualification because they played a role that was "functionally indistinguishable from . . . a trial judge." (*Id.* at p. 11.) (quoting *Kempthorne*, 449 F.3d at 1269.)

Petitioners grossly mischaracterize the Sixth Circuit holding. The Sixth Circuit actually held that Petitioners failed to demonstrate "a clear and indisputable right to the disqualification of the technical advisors because they have not shown that they were or are acting in a quasi-judicial capacity." (Pet. App. 3a.) Indeed, the Sixth Circuit explicitly acknowledged the general rule that the "prohibition against obtaining personal knowledge of disputed facts set forth in [28 U.S.C.] §455 has been applied to a special master or a court appointed monitor serving in a quasi-judicial capacity," and expressed no reservation about the rule. (*Id.*) In other words, the Sixth Circuit's holding rests on Petitioners' failure to satisfy the underlying factual prerequisite that the technical advisors be "acting in a quasi judicial capacity."

Petitioners' conflict argument rests on their erroneous and unsupported assumption that the former special master in his current new role as a technical advisor is now acting as "in a quasi judicial capacity" in the instant case. They ignore the plain fact that the former special master was relieved of his duties as a special master and a new panel has been appointed to replace him. (*Id.* at 12a.) The relevant inquiry is whether the former special master should be disqualified as a technical advisor going forward.

Petitioners have not offered and cannot offer, any legal authority supporting their position that the technical advisor is now acting "in a quasi judicial" capacity in this case and hence is subject to disqualification due to any alleged bias.

The Sixth Circuit's refusal to review the district court's decision also does not otherwise create an impermissible conflict with the other circuits. Although not clear from their arguments, Petitioners seem to be suggesting that the former special master's work product should be suppressed because of his prior role as a special master due to the prior alleged improper *ex parte* communication with Judge Nixon. Even though the former special master was acting "in a quasi judicial capacity" when he prepared the proposed remedial plan and the report, Petitioners have cited no law which mandates suppression of the former special master's work product under the circumstances found in this case. In refusing to second guess the district court's refusal to suppress the work product, the Sixth Circuit concluded that the recusal of Judge Nixon and the opportunity to litigate all of the issues rendered it unnecessary for the Sixth Circuit to intervene. The Sixth Circuit's decision does not conflict with the *Kempthorne* decision. As explained below, the Sixth Circuit's conclusion is amply supported by the record and plainly correct.

To support their conflict argument, Petitioners cite a line of cases in which special masters performing quasi judicial functions are subject to disqualification. (Pet. at pp. 12-13.) Petitioners' reliance on those cases is misplaced. The underlying factual premise in those decisions – that the technical advisor exercise "quasi judicial" powers – does not exist in this case. Petitioners have not offered, and cannot offer, any support for their assumption

that the technical advisor and his experts in this case are treated in the same way as special masters acting in a quasi judicial capacity.

The *Kempthorne* decision, relied on principally by Petitioners, is entirely distinguishable on the facts. In the *Kempthorne* case, the D.C. Circuit court suppressed the reports prepared by the special master because the special master engaged a senior officer of an interested party to assist him. The special master's reports relied upon the facts gathered by the senior officer. Under those circumstances, the D.C. Circuit found that the suppression of the reports was necessary. *Kempthorne*, 449 F.3d at 1271-1272.

Unlike the *Kempthorne* case, the alleged improper conduct in this case was the *ex parte* communication between Judge Nixon and the former special master, which allegedly deprived Petitioners of an opportunity to be heard. Even assuming, *arguendo*, that the *ex parte* communication was somehow improper (Petitioners have provided no authority to support their allegations of improper conduct), Judge Nixon had already vacated the allegedly "tainted" order and recused himself. (Pet. App. at 19a, 21a.) Furthermore, Judge Haynes relieved the special master of his duties as a special master. He ordered a full disclosure of information related to the former special master's report and the proposed plan and full hearing on the issues of the state's non compliance and any remedial plan. (*Id.* at 13a-14a.) Petitioners will have an opportunity to be heard on all issues and the opportunity to challenge the former special master's conclusions and examine him on any alleged bias. Significantly, unlike the *Kempthorne* case, Petitioners offered no evidence that the report and the proposed plan prepared by the former special master in this case were tainted by any conflicts of interests.

Indeed, the attempt by Petitioners to elevate an unpublished interlocutory order to the level of a precedent based on gross mischaracterization is disingenuous. The Sixth Circuit's unpublished order cannot serve as a binding precedent, let alone represent a major "split among the circuits." *In re Patricia Miller*, 377 F.3d 616, 622 (6th Cir. 2004). Petitioners' action in this Court merely demonstrates their apparent determination to further protract this almost decade-long litigation and to avoid a hearing on their non compliance with the Consent Decree.

II. The Sixth Circuit's Decision is Plainly Correct.

The Sixth Circuit correctly denied the Petitioners' petition for writ of mandamus. Mandamus is an "extraordinary remedy to be reserved for extraordinary situations," *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). A writ of mandamus should not issue unless the petitioner shows both a "clear and indisputable" right to relief and that "the error is irremediable by regular appellate remedies." *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295 (5th Cir. 2000). Clear error alone does not support the issuance of a writ of mandamus because an error – even a clear one – could be corrected on appeal without irreparable harm. *Nat'l Ass'n of Crim. Def. Lawyers v. United States DOJ*, 182 F.3d 981, 987 (D.C. Cir. 1999). Whether or not a writ should be granted rests within the sound discretion of the Sixth Circuit. *Kerr v. United States Dist. Court for Northern Dist.*, 426 U.S. 394, 403 (1976).

Based on the record, the Sixth Circuit found that Petitioners had failed to demonstrate "a clear and indisputable" right to relief because they failed to show that the

technical advisors were acting in a quasi judicial capacity. Even assuming, *arguendo*, that the former special master acted improperly, he had been discharged as a special master and a new panel had been appointed to replace him. (Pet. App. 6a-7a, 12a.)

Indeed, Petitioners have offered no evidence or legal authority to support their allegation that the *ex parte* communication between Judge Nixon and the former special master was improper in the first place. Contrary to Petitioners' representation, FED. R. CIV. P. 53 does not prohibit *ex parte* communication between a special master and the court; rather, it leaves the issue to the judge's discretion.[1] (*Id.* at 91a.) Judge Nixon was acting within his sound discretion when he relied on the report from the special master. *See In re Brooks*, 383 F. 3d 1036, 1042 (D.C. Cir. 2004) (refusing to issue a writ of mandamus where there was no evidence that the judge had acquired "personal knowledge of disputed evidentiary facts"). The steps taken by the district judges – Judge Nixon's decision to vacate the October 2004 Order, his *sua sponte* recusal, and Judge Haynes' discharge of the former special master – are motivated by their desire to avoid protracted discovery battle over collateral issues and to resolve the issues as quickly as possible for the benefit of the children in the TennCare program, a desire obviously not shared by Petitioners here.

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[1] When Judge Nixon appointed the special master in this case in April 2002, FED. R. CIV. P. 53 did not require that orders appointing special masters address the topic of *ex parte* communication between the court and the special master. It was not until December 2003 that Rule 53 was amended to add the requirement. (Pet. App. 90a-91a.)

The Sixth Circuit's denial of the extraordinary writ also turned on the Sixth Circuit's factual finding that the writ was not necessary under the circumstances. A new judge has been assigned to the case. Petitioners will have full discovery on all the issues relevant to the report and the proposed plan. Petitioners will have full opportunity to be heard and to challenge the report and the proposed plan in front of a new judge. Under the facts of this case, the Sixth Circuit cannot be said to have abused its broad discretion in denying the extraordinary writ.

III. Invoking the Court's Supervisory Power Is Improper Because It Invites This Court to Second Guess The Lower Courts' Factual Findings Based On Pure Speculation.

Stripped of their alarmist contentions based on mischaracterization of the Sixth Circuit decision, Petitioners are really seeking to invoke this Court's extraordinary power based on speculation of possible bias. Petitioners fail to demonstrate how this case presents any compelling reason to justify this Court's exercise of its supervisory power before a final judgment has been entered. U.S. Sup. Ct. Rule 10.

The issues below involved the district court's appointment of experts and the lower courts' sound exercise of their discretionary duties in managing their own cases. These are not the type of issues that rise to the level of such "imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." U.S. Sup. Ct. Rule 11; *Rice v. Sioux City Memorial Park Cemetery, Inc. et al.*, 349 U.S. 70, 77 (1955) (writ of certiorari dismissed as improvidently granted because case is one of "isolated significance" not

involving principles of importance to the public). In addition, the determination of the disqualification issue turned on specific factual findings (by both the district court and the Sixth Circuit).

Petitioners' arguments are premised on alleged "actual and apparent bias" on the part of the special master and the experts. (Pet. at p. 18.) Yet, other than pure speculation and insinuations, Petitioners have not even explained how, in light of the steps taken by the district court, any "bias" as a result of the *ex parte* communication between the *former* judge and the *former* special master could possibly prejudice Petitioners in the litigation going forward.

The undisputed record demonstrates that a new judge has been appointed and new monitors selected. The new judge has ordered full discovery and full hearing on the disputed issues in this case. (Pet. App. at 13a-14a.) Therefore, even to give credence to Petitioners' concerns, this Court would have to accept Petitioners' following unwarranted assumptions: 1) The new judge cannot perform his duties independently although there is no allegation of bias against him; 2) the five newly appointed monitors cannot discharge their duties independently; 3) the State will not have an opportunity to examine the technical advisor and his experts on their report and proposed remedial plan, even though the new judge has ordered full discovery and a hearing; and 4) any alleged error cannot be corrected in the normal appellate review process upon a final judgment. Unwarranted assumptions cannot serve as the basis for the grant of certiorari jurisdiction, much less a summary reversal. *NLRB v. Hendricks Country Rural Electric Corp.*, 454 U.S. 170, 176, fn. 8 (1981) (writ of certiorari on cross-petition was dismissed as improvidently

granted because it presented primarily a question of fact that did not merit Court review); *General Talking Pictures Corp. v. Western Electric Co. et al.*, 304 U.S. 175, 178 (1938) (refusing to issue a writ on questions dependent on the facts because "granting of the writ would not be warranted merely to review the evidence or inferences drawn from it"); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924) (writ of certiorari dismissed because case presented "primarily a question of fact" which "is not a ground upon which the court granted the petition").

Essentially, Petitioners are unhappy with the lower courts' decisions and the experts' recommendations. Petitioners are attempting to invoke this Court's certiorari jurisdiction based on unsupported and unwarranted allegations that the new judge, the technical advisor and the new monitors are "biased." Granting the petition here based on an imaginary conflict among the circuits, mere dissatisfaction with court orders, and rampant speculation would pose a "direct threat" to the integrity of the judicial process. It would give any dissatisfied litigant access to this Court's extraordinary supervisory power. It would also permit an end run around the well established rule against interlocutory appeals and piecemeal litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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